

6-1927

## Recent Case Notes (and Indiana Docket)

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>



Part of the [Courts Commons](#), and the [State and Local Government Law Commons](#)

### Recommended Citation

(1927) "Recent Case Notes (and Indiana Docket)," *Indiana Law Journal*: Vol. 2: Iss. 9, Article 9.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol2/iss9/9>

This Special Feature is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## RECENT CASE NOTES

CONSTITUTIONAL LAW—COMMERCE—Action by appellant against the appellee, as receiver of an Indiana Corporation, located in Indiana, upon a claim either for the return of certain machinery or to be declared a preferred claim. The appellant, a foreign corporation, without complying with the laws of this state relative to foreign corporations doing business, sold upon a conditional sale contract to a Dairy Corporation an ammonia compressor and other machinery for its plant, and agreed and did furnish an engineer to erect and install said machinery. The engineer hired local labor to assist. There seemed to be no other work other than assembling. The question was brought to the Appellate Court by an appeal from judgment upon a demurrer sustained to a claim filed, based upon the above facts. The issue: Was the sale of the plant in question and its erection by appellant, doing interstate or intrastate business? Held: That it was interstate commerce, the court saying that all the work was involved in the sale. *Vilter Mfg. Co. v. Evans* (Indiana Appellate Court in Banc). Jan. 6, 1927. 154 N. E. 677.

The question is purely a federal one, arising under the constitution of the United States. It is well therefore to see what that Court has decided upon the question as to what constitutes interstate and intrastate commerce. In *Brown v. Waycross*, 233 U. S. 16, it was held that the business of erecting lightning rods as the agent of a non-resident manufacturing concern, on whose behalf such agent had solicited orders for the sale of such rods, was intrastate, namely—carrying on a business strictly local in character. The test applied here was stated in these words: "Affixing of lightning rods to houses, was the carrying on business of a strictly local character, within the exclusive control of state authority. Such business was wholly separate from interstate commerce; involved no question of the delivery of property shipped in interstate commerce, or right to complete an interstate commerce transaction but concerned the doing a local act after commerce had terminated." *General Railway Signal Co. v. Virginia*, 246 U. S. 500, held that a foreign manufacturing corporation is engaged in local business within the state when in installing automatic railway systems, it became necessary to employ local labor to dig trenches, construct concrete foundations and to paint the complete structures. The test applied was the same as in the Waycross case, *supra*. *Kansas City Steel Co. v. Arkansas*, 269 U. S. 148, held that the construction of a bridge in the State of Arkansas was local business, merely following and citing the above cases. Peddling goods in original packages was held to be intrastate commerce in *Emmert v. Missouri*, 156 U. S. 296. Solicitors for stockyards, *Hopkins v. U. S.*, 171 U. S. 578. Manufacturing of goods by child labor, *Hammer v. Dagenhart*, 247 U. S. 251.

On the other hand *York Mfg. Co. v. Cable*, 247 U. S. 21, held the sale of an artificial ice plant was interstate commerce, when the foreign corporation seller agreed to furnish an engineer who should assemble and erect the machinery at the point of destination, and should make a practical test of efficiency before complete delivery. The test applied here was in these words: "A contract inherently relating to and intrinsically dealing with the thing sold, the machinery and all its parts constituting the ice plant." A drummer soliciting orders for a foreign corporation has been held to be engaged in interstate commerce, *Robbins v. Shelby County*

*Taxing District*, 120 U. S. 489. Employees connected in any way with interstate commerce, *Second Employers' Liability Cases*, 223 U. S. 1. *Stockyards, Swift v. U. S.*, 196 U. S. 375. Bailment of grain in an elevator, *Lemke v. Farmers Grain Co.*, 258 U. S. 50. Selling of steamship tickets, *De Santos v. Commonwealth of Pennsylvania*, 47 S. Ct. 267. It seems therefore that the Appellate Court was correct on principle in the *Vilter* case, *supra*, and it is supported by sufficient authority, but it is impossible to reconcile it with some of the other cases. The two lines of cases illustrate the extreme difficulty of applying any fixed rule to a problem involving our dual form of government. The line of demarcation in all its phases is yet to be found. J. O. H.

DAMAGES—PUNITIVE DAMAGES—November 15, 1921, plaintiff, Charles T. Duray, purchased of the defendant, Skufakiss, a small business, consisting of a stock of candies, etc. He conducted the business until August 20, 1923, and paid rent to the defendant during the first year then to the Columbia Hotel Company, the appellant, in which concern Skufakiss is a partner. August 20, by deceit, Skufakiss obtained the key to the premises and locked plaintiff out, and removed the goods, some of which were lost. In a trial for damages for the trespass the jury was instructed that if defendants had committed the trespass in a wanton and wilful manner, the jury could assess punitive or exemplary damages. *Held*: Instruction erroneous, since defendants could also be convicted under the criminal code (*Burns' Ann. St. 1926, Sec. 2497*), and thus be punished twice for the same trespass. *Skufakiss et al. v. Duray*. Decided in the appellate court of Indiana, December 9, 1926, 154 N. E. 289.

A long line of Indiana decisions has firmly established the above stated doctrine in this jurisdiction. *Wabash Printing Co. v. Crumrine*, 123 Ind. 89-93, 21 N. E. 904; *Stewart v. Maddox*, 63 Ind. 51-55; *Borkenstein v. Shrack*, 31 Ind. App. 220, 221, 67 N. E. 547; *Indianapolis Bleaching Co. v. McMillan*, 113 N. E. 1019, Sec. 17, *Corpus Juris* 278. In this position Indiana stands with Massachusetts, Nebraska, and the District of Columbia, as opposed to the decisions handed down in nearly all the other states, and in England. Our position has been arrived at through a literal observance of the constitutional provision against subjecting a person to a double punishment for any wrongful act that he may commit. This position seems entirely tenable, but the opposite decision is reached through a more liberal view of the wrongs intended to be corrected in the two remedies allowed. Those jurisdictions which award exemplary damages in acts punishable criminally, have distinguished between private and public offenses which appear in the malicious act of defendant. "The damages allowed in a civil case by way of punishment, have no necessary relation to the penalty incurred for the wrong done to the public: but are called punitive damages by way of distinction from pecuniary damages, and to characterize them as a punishment for the wrong done to the individual. In this view, the awarding of punitive damages can in no just sense be said to be in conflict with the constitutional or common law inhibition against inflicting two punishments for the same offense." *Hendrickson v. Kingsbury*, 21 Iowa 379, 391; *Brown v. Evans*, 17 Fed. 912; *Elliott v. Van Buren*, 33 Mich. 49; *State v. Sholin-Carpenter Co.*, 99 Minn. 158, 108 N. W. 935. Our court did not refer to the many contra decisions on this subject, some of which are cited above, nor state any factors leading it to its decisions. The Indiana courts have chosen to accept the doctrine as

laid down in the principal case, and the same is now the accepted rule in this jurisdiction.

G. R. R.

**EVIDENCE—APPEAL AND ERROR—PHYSICIANS AND SURGEONS.**—Action for malpractice by appellee against appellant to recover damages on account of injuries alleged to have been sustained by appellee while a patient under the care and treatment of appellant, a dentist. Verdict for appellees for \$5000 on which judgment was rendered. Appellant seeks reversal on the ground that an instruction tendered by him was improperly refused. Instruction 11 follows:

"In considering whether defendant in his examination, diagnosis, treatment and care of plaintiff's ailment exercised ordinary care and skill, you cannot set up a standard of your own, but must be guided solely in that regard by the testimony of physicians, dentists and dental surgeons; and if you are unable to determine from the testimony of these experts what constitutes ordinary care and skill under the circumstances of this case, then there is a failure of proof upon the only standard of your guidance, and the evidence is insufficient to warrant a verdict for plaintiff, and your verdict should be for defendant." Appellee contends that this instruction was properly refused because it goes beyond the issues, in that it includes the element of ordinary care and skill to be exercised in examination and diagnosis of appellee's jaw, while the complaint does not charge that appellant did not properly examine appellee's ailment, the negligence complained of being the want of ordinary care and skill in the treatment administered. Held: For error in refusing the instruction, judgment is reversed. *Welch v. Page*, App. Ct. of Ind. Nov. 18, 1926, 154 N. E. 24.

The fact that the instruction included examination and diagnosis of appellee's ailment is not sufficient to justify its refusal. The real gist of the instruction is found in the character of testimony by which the jury must be controlled, the instruction informing the jury that it must be guided solely in that regard by the testimony of physicians, dentists and dental surgeons. There is considerable dispute in different jurisdictions over the question of how much effect should be given to testimony by experts and skilled witnesses, but the law in Indiana is well established on this point. Indiana is in accord with the Federal rule, laid down in *Ewing v. Goode*, 78 Fed. 442, by (now Chief Justice) Taft: Where a case concerns the highly specialized art of treating with respect to which a layman can have no knowledge at all, the court and jury must be dependent upon expert evidence. There can be no other guide, and where want of skill or attention is thus not shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury. The case of *Adolay v. Miller* (1916), 60 Ind. App. 656, 111 N. E. 313, is in accord with the Federal rule, although perhaps it is broader in effect: When there is no evidence from which it might be reasonably inferred that there was or was not negligence, so the question of negligence be left without a standard for determination, and wholly for conjecture, the question is one of law for the court, and a directed verdict would be affirmed. Whether a physician has treated a particular injury properly, or whether a particular disease has resulted from alleged negligent treatment, and like questions of science, must of necessity depend upon the testimony of physicians and surgeons learned in such matter. Questions requiring scientific

or expert knowledge can only be answered by those possessing the requisite knowledge to give their answers probative value. And persons not so qualified are not therefore competent witnesses as to questions depending wholly on such scientific or expert knowledge. The above rule does not have the effect of limiting or prescribing the testimony of nonexpert witnesses as to particular facts within their knowledge, which bear upon questions depending for their ultimate solution upon scientific knowledge. In malpractice suit, facts relating to treatment and condition of a patient may be stated by such witnesses, though they are incompetent to give an opinion as to the value or effect of such facts from a medical or surgical standpoint. *Longfellow v. Vernon* (1915), 57 Ind. App. 611, 105 N. E. 178. The case of *Tefft v. Wilcox*, 6 Kan. 46, cited by several Indiana cases, sums up the law on this question: The question of what constitutes ordinary skill and ordinary care or diligence on the part of a physician and surgeon is one of law. The jury must be informed as to the facts or criterion upon and by which the standard of ordinary skill and ordinary care and diligence rests and is regulated in these professions. This evidence must, from the very nature of the case, come from experts.

A. V. R.

EXCHANGE OF GOODS—SALE; PRIOR CLAIM ON RECEIVER.—The Herring Motor Co. claims against the Aetna Trust Co., as receiver for Burpee-Johnson Co., for a prior right to \$3,077.89 worth of goods of the insolvent company. From a judgment below allowing the claim, but denying the petition for priority, the plaintiff appeals. The appellant's amended claim sets out that prior to June 16, 1923, the appellant purchased and received from Burpee-Johnson Co. a quantity of automobile accessories (principally shock absorbers) worth to exceed \$5,300; that an agreement was entered into between the parties whereby the appellant was to return such of the goods as he so desired, and receive in exchange therefor other goods (particularly steering wheels, oil gauges and foot accelerators) then held or to be manufactured by the said company, equal in value to the goods returned; that appellant had returned goods to the value of \$5,324.39; that the company delivered other merchandise to the appellant to the value of \$2,246.50; that appellant was led to believe that the company held in its possession, subject to the orders of the appellant, merchandise to the value of \$3,077.89; that the appellee unlawfully disposed of this property; that by reason of these facts the appellant was entitled to a prior claim to the value thereof. *Held*: The return of the goods by the Herring Motor Co., to the Burpee-Johnson Co., as stated above, amounted to a sale and was not a mere exchange of goods, and that the claim for the price thereof should be granted but the petition for priority should be denied. *Herring Motor Co. v. Aetna Trust Co.*, 154 N. E. 31.

One of two conditions must exist, the court argues, in order to support the appellant's position. First, either the title to the goods returned by the appellant did not pass to the company except when, and only when, other goods were shipped to the appellant, or, secondly, the title to all the goods which the appellant was subsequently to receive from the company vested immediately in the appellant. Neither of the theories is correct, the court says, the rule applying to such cases as the present one being stated in 23 C. J. 185: "Any transaction whereby property is parted with for a valuable consideration, whether there be a money payment or not, provided the bargain is made and the value measured in money terms,

and paid or agreed to be paid in something which the parties agree to treat as a specified amount of money, is a sale." *Westfall v. Ellis*, 141 Minn. 377, 170 N. W. 340; *Baltimore, etc., Railroad Co. v. Western, etc., Co.*, 241 F. 162; *Gills v. Eagleton*, 108 Neb. 179, 187 N. W. 871; *Fagin v. Hook*, 134 Iowa 381, 105 N. W. 155, 111 N. W. 981, are in accord with the rule. There was, therefore, in this case a sale of the \$5,300 worth of goods returned by the appellant to the company. Title to the goods was therefore in the company, and appellant would be in the same position as a general creditor for the purpose of collecting the price of the goods sold, except for the agreement that appellant was to have other goods in payment for those sold by him. The existence of an agreement between the parties whereby the appellant was to be paid in other goods for the goods sold by him to the company, does not cause title to the said other goods to be manufactured and delivered by the company to vest in the appellant immediately. The court cites a "well established rule of law that where the goods are yet to be manufactured, or anything remains to be done to them, to determine the price, quantity, or kind of goods, or to determine the time of delivery, precedent to delivery, the contract is executory, and ordinarily the title to the property does not pass." *Benjamin on Sales*, 151, 152, 221, 222; *Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303; *Coddington v. Turner* (Ind. App. ), 139 N. E. 323. F. S. B.

# INDIANA DOCKET

## SUPREME COURT

25174. *BOTTORFF v. STATE*. Lawrence County. *Affirmed*. Willoughby, J. May 26, 1927.

Irregularities in the selection of a grand jury must be pleaded in abatement and cannot be shown in a motion to quash the indictment.

25247. *BROGAN v. STATE*. Starke County. *Reversed*. Gemmill, C. J. Martin, J., dissents. May 10th, 1927.

Where an amended affidavit is filed upon which appellant is prosecuted under a criminal statute, it is error for the record not to show that this amended affidavit was approved by the prosecuting attorney in keeping with the requirement of section 2151 Burns' 1926. Martin, J., dissents from this opinion on the ground that in this case the prosecuting attorney in fact approved the amended affidavit and filed it himself in open court and that it would be a forced construction of the statute to hold this insufficient.

25083. *GREEK ORTHODOX CHURCH, ET AL. v. ALEXANDER, ET AL.* Marion County. *Affirmed*. Myers, J. May 24, 1927.

A decision cannot be reversed on the grounds that it improperly affects rights of persons who are not parties to the litigation. This is true although the case involves an allegation that interferes with purely religious matters by a receiver appointed by the court.

25223. *HICKS v. STATE*. Marion County. *Affirmed*. Myers, J. May 26, 1927.

Since there is no statute covering the point, the order in which the state and the defense may challenge jurors in criminal cases is left to the discretion of the trial judge.

20216. *NOSCIELSKI v. STATE*. St. Joseph County. *Affirmed*. Gemmill, C. J. May 17, 1927.

Where defendant is driving an automobile without lights he is committing a misdemeanor and an officer may investigate this and may place defendant under arrest for transporting liquor in violation of law where he sees a keg of liquor in the automobile and defendant admits that it is whisky. If the officer then searches the automobile for further evidence, such evidence is admissible on trial since it is a lawful search pursuant to a lawful arrest by an officer without a warrant.

24864. *RUTHERFORD v. STATE*. Marion County. *Reversed*. Travis, C. J. May 25, 1927.

That part of section 1, chapter 215, Acts 1913, (Burns' 1926, Sec. 2949), which purports to make it a criminal offense for one to draw a check or draft in payment of any obligation knowing that funds were not available to meet the draft is unconstitutional on the ground that this part of the Act is not fairly expressed in the title.

25428. *SHAW v. MEYER-KISER BANK*. Marion County. *Reversed*. Myers, J. May 18, 1927.

Where a guardian has mortgaged his ward's property in accordance with the Illinois law but without securing the court authority required

in Indiana, and by so doing he has discharged former claims against the property, he is entitled to a lien against the property for the amount of the invalid mortgage on the principle of subrogation but not on the principle of enforcing the invalid mortgage.

24706. SILVERMAN V. STATE. Vanderburgh County. *Reversed*. Travis, J. May 28, 1927.

It is error for a trial court to summon jurors for special venire apart from the form prescribed in the statute where this is done under the objection of counsel and not in aid of securing the necessary jurors; and it is error for the trial court to permit the jury to disperse during the trial in a criminal case of a serious offense where counsel requests that the jury be kept together.

24604. SMITH, ET AL V. STATE. Fayette County. *Reversed*. Travis, J. May 18, 1927.

This case was reversed on the ground that there was not sufficient evidence to prove the receipt of intoxicating liquor from a carrier in accordance with the allegation of the complaint and the Indiana statute.

24607 TORPHY V. STATE. Lawrence County. *Reversed*. Travis, J. May 24, 1927.

The motion to quash should have been sustained in keeping with the principles laid down in *Crabbs v. State* (1923), 193 Ind. 248, 139 N. E. 180.

24464 VANDAGRIFFT, ET AL. V. STATE, EX REL. Marion County. *Affirmed*. Gemmill, C. J. May 10, 1927.

Where a land owner does not remonstrate against an assessment after the assessment has been finally approved, he cannot object to the amount later even though he did remonstrate to a preliminary assessment.

#### APPELLATE COURT

12848 BEILBACH, ETC. V. URLEWITZ. Marion County. *Affirmed*. *Per Curiam*. May 24, 1927.

12679 BOJRAB V. B & B SAND & GRAVEL COMPANY. Allen County. *Affirmed*. Thompson, J. May 17, 1927.

It is not the rule in Indiana that where one is shown to be driving the automobile of another, this alone is sufficient evidence to justify the inference that the driver is a servant of the owner.

12648 BONHAM V. FINKLE WELLS COUNTY. *Affirmed*. Nichols, J. May 20, 1927.

One may collect on a promissory note where the consideration is stock of a corporation even though this stock has not been duly issued in accordance with law, if the seller is selling his own stock and not stock on behalf of the corporation.

12868 CARTER ET AL. V. TEMPLETON COAL COMPANY. Industrial Board. *Affirmed*. Nichols, J. May 17, 1927.

Where an illegitimate daughter of fifteen years has been reared in the home of her grandfather and has been dependent upon him for support she is entitled to claim compensation for her grandfather's death under the Workmen's Compensation Act.



12869 CARTER V. DRAKE. Rush County. *Affirmed. Per Curiam.* May 25, 1927.

Where the court must give particular instructions if counsel requests them, it is not error for the court to give only general instructions where counsel has not requested other instructions.

12718 CATHERWOOD, ET AL. V. FORD, ET AL. Warren County. *Affirmed.* Thompson, C. J. May 24, 1927.

It is not error to admit book entries in evidence where such entries were made at the time of the sale.

12873 COLUMBIAN ENAMELING AND STAMPING COMPANY V. CRAMER. Industrial Board. *Affirmed.* Thompson, J. May 11, 1927.

Where an employee is injured at his work and reports this to the employer's nurse and the nurse testifies that the employee so reported the injury and the employee dies from the injury, then there is competent evidence to hold employer liable even though no one saw the injury or had direct evidence that the injury occurred as the employee alleged it did.

12777 COLUMBIA WEIGHING MACHINE CO. V. CASSADAY. Vigo County. *Affirmed. Per Curiam.* May 17, 1927.

*Per Curiam.*

12921 CUNNINGHAM CONSTRUCTION CO. V. MORGAN. Industrial Board. *Affirmed.* Remy, J. May 20, 1927.

Here the court held that there was competent evidence to support the finding of the Industrial Board. No discussion of the evidence is given.

12776 DICKEN, ET AL. V. SHARP. Miami County. *Affirmed. Per Curiam.* May 27, 1927.

*Per Curiam.*

12790 DROEGE V. HOADGLAND STATE BANK. Allen County. *Affirmed.* Remy, J. May 27, 1927.

A good faith acceptance of a renewal note to which the name of the surety has been forged does not operate as a discharge of the original note.

12861 ERNSTING, ET AL. V. STEGMAN. Morgan County. *Affirmed.* McMahan, C. J. May 18, 1927.

On appeal the court will not consider evidence which does not appear in the record.

12868 GALKOWSKI V. HUBBARD STEEL FOUNDRY COMPANY. Industrial Board. *Affirmed.* Thompson, J. May 17, 1927.

Where there is competent evidence in support of the Industrial Board finding of a question of fact, the court will not change this finding on appeal.

12945 GARDNER V. COVINGTON. Fountain County. *Affirmed.* McMahan, C. J. May 27, 1927.

Where a city has no power to control a public street, it has no responsibility for injuries caused by the disrepair of those streets.

12738 GARNER V. COLUMBIA INVESTMENT CO., ET AL. Marion County. *Affirmed. Per Curiam.* May 17, 1927.

*Per Curiam.*

12850 GRANITE IMPROVEMENT COMPANY V. RICHARDS, ET AL. Greene County. *Reversed.* Nichols, J. May 20, 1927.

This case is reversed on the authority of *Granite Improvement Co. v. O'Haver*, decided by the court in this term (Appellate Court No. 12851).

12851 GRANITE IMPROVEMENT CO. V. O'HAYER. Greene County. *Reversed.* Nichols, J. May 20, 1927.

Where one is in possession of land under a contract to purchase, the legal owner of the land may not be subjected to a lien against the land on account of the one in possession.

12762 HOAG, ET AL. V. JEFFERS. Marion County. *Reversed.* Nichols, J. May 27, 1927.

Where no hardship will be caused to the defendant and the complainant or his attorney have been guilty of excusable negligence, then the judgment taken by default may be set aside in accordance with Burns' 1926, sec. 423.

12593 THE HOME INSURANCE CO. V. COOTER, ET AL. Monroe County. *Affirmed.* Enloe, J. May 25, 1927.

Where there is a cross-complaint filed in a case and the defendant properly succeeded in this cross-complaint, then there is no ground for a new trial where the motion is for a new trial of the entire case even though there was ground for a new trial on the original case.

12712 HOPPER, EXECUTOR, ET AL. V. STEED, ET AL. Jay County. *Affirmed.* Remy, J. May 17, 1927.

Section 552 Burns 1926 does not prohibit heirs from testifying in regard to the sanity of their father at the time he made his will.

12800 HUNTER, GUARDIAN V. BRADSHAW, ET AL. Owen County. *Affirmed.* *Per Curiam.* May 17, 1927.

12708 JEWETT, RECEIVER V. HERR, ET AL. DuBois County. *Reversed.* Nichols, J. May 17, 1927.

A promissory note is a promise to pay and the consideration for this promise may be a detriment to the promisee or benefit to the promisor.

12717 KOONTZ V. KOONTZ. Starke County. *Affirmed.* Enloe, J. May 18, 1927.

An ante-nuptial contract for the purpose of excluding the parties of the marriage from any right of inheritance from each other or claim against the estate of each other may be reduced to writing after marriage if this is done in pursuance of the contract before marriage.

12702 KOSCIELNY, ET AL. V. SIKORSKI. Noble County. *Affirmed.* *Per Curiam.* May 10, 1927.

12904 LIFE V. STRICLER, ET AL. Grant County. *Affirmed.* Nichols, J. May 27, 1927.

Where a provision in a will directs that the executor sell real estate and distribute the proceeds but does not pass legal title to the executor, then the title to the real estate is in the heirs until the sale is made.

12656 MAHONEY V. SHARPE, ADMR. Whitley County. *Reversed.* Nichols, J. May 17, 1927.

Where a public official has placed an obstruction in the highway, there can be no recovery against a contractor for not placing lights on this obstruction so as to prevent injury, if he had no authority under the statute to deal with the obstruction at all.

12389 NORTHERN INDIANA POWER CO. V. CASTOR. Clinton County. *Affirmed.* Thompson, J. May 18, 1927.

One cannot take advantage of the statute of limitations unless it is pleaded in the trial court.

12649 SAWICKI, ET AL. V. TYLISZ, ET AL. LaPorte County. *Affirmed.* Nichols, J. May 17, 1927.

A purchaser in possession cannot debate the inconvenience of the purchase price on the ground that the description of the land conveyed was uncertain and imperfect.

12585 SHEA V. PEOPLES COAL & CEMENT CO., ET AL. Marion County. *Reversed.* Enloe, J. May 19, 1927.

Parties to an insurance contract or other contract made stipulate for a shorter time than the statute of limitations within which the contract shall be brought, and this stipulation shall be binding on the parties unless the time so stipulated is unreasonable under the circumstances.

12667 TRIUMPH-THE CHURCH AND KINGDOM OF GOD IN CHRIST, ET AL. V. LITTLEJOHN, ADMR. Marion County. *Affirmed. Per Curiam.* May 20, 1927.

*Per Curiam.*

12772 UNION ASSURANCE SOCIETY V. RENSER. Vanderburgh County. *Reversed.* Nichols, J. May 27, 1927.

Where the insurer has received a premium in ignorance that a breach of policy has occurred, it may refuse to pay the loss and not return the premium until suit is brought.

12791 WALEIS, ET AL. V. KOZACIK. Lake County. *Affirmed.* Nichols, J. May 20, 1927.

Where one party holds property under a lease with an option to buy and, upon electing to buy, the owner delivers a merchantable title before the expiration of the lease, then the option has been executed within a reasonable time and the lease may compel specific performance of the contract of purchase.

12707 WALLACE V. MERTZ, ET AL. Tippecanoe County. *Reversed.* Nichols, J. May 17, 1927.

Even though a contract is not complete in covering all the matters involved nor specific in its terms, the court will use reasonable means to find the intention of the parties and to enforce the contract where it appears the parties did intend a binding contract and where the terms may be reasonably deduced from the words of the written instrument itself.

12957 MCCARDLE, ET AL. V. AKRON TELEPHONE COMPANY. Fulton County. *Reversed.* McMahan, J. May 11, 1927.

The Public Service Commission may order the installation of a new line or changes in an old line of telephone wires over the objection of the

company involved provided it does not appear that such changes are in violation of its statutory authority or in fact result in the taking of property without due process of law.

12519 MCCLAREN, ET AL. V. DAWES ELECTRIC SIGN AND MFG. CO. Allen County. *Affirmed*. McMahan, C. J. May 17, 1927.

There is no statutory authority for a so-called Massachusetts trust under the Indiana law. Persons operating under a purported common law trust in Indiana may be held liable as partners.

12796 METZGER V. HAMP. Marion County. *Reversed*. Remy, J. May 19, 1927.

The refusal of the State Board of Tax Commissioners to permit interstate parties to file an intervening petition may be an abuse of discretion and constitute grounds for reversal.

12732 MOLSEBERGER AND SHILLING V. LAPIERRE. Lake County. *Affirmed*. Thompson, J. May 11, 1927.

A question cannot be considered on appeal unless it was presented to the trial court.

12691 NOBLESVILLE MILLING Co. V. WITHAM. Hamilton County. *Reversed*. Remy, J. May 18, 1927.

One cannot recover in an action based on negligence at common law for the injury caused by a fellow servant unless he shows that the fellow servant was incompetent and that the employer was negligent in employing this incompetent servant and that he himself was free from contributory negligence.